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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 39

THE NEW YORK TIMES COMPANY, A CORPORATION,
Petitioner,

vs.

L. B. SULLIVAN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA.

BRIEF OF TRIBUNE COMPANY AS AMICUS CURIAE

HOWARD ELLIS,
KEITH MASTERS,
DON H. REUBEN,
130 East Randolph Drive,
Chicago 1, Illinois,
Attorneys for the Tribune Company,
Tribune Tower, Chicago, Illinois.

Of Counsel:
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS,
Chicago 1, Illinois.

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The Tribune Company, by its attorneys, Howard Ellis, Keith Masters, and Don H. Reuben, submits this brief as *amicus curiae* in support of petitioner, the New York Times Company, pursuant to leave granted by the Court on May 13, 1963, 373 U. S. 907. The interest of the Tribune Company as *amicus curiae* is fully presented in the motion for leave to file this brief and in the affidavit, attached thereto, of W. D. Maxwell, Editor of the *Chicago Tribune;* that motion and affidavit are hereby incorporated by reference in this brief.

ARGUMENT

This proceeding is one of twelve separate suits to prevent a newspaper from printing information about the struggle for integration.[1] The *New York Times*, a Northern newspaper consistently advocating integration, is the target in each case; the *Times'* policy in support of this Court's equal rights decisions is well known.

The present case attacks an advertisement in the *Times* soliciting funds to support integration; the keynote of the ad was a slogan, "Heed Their Rising Voices," derived from a *Times* editorial. The plaintiff, Sullivan, is a city commissioner of Montgomery, Alabama, a scene of repeated clashes between segregationists and Negroes.

We believe that in this context the several proceedings below were conceived to punish the *Times* for its integration views and to discourage all newspapers from printing such material. If Sullivan's $500,000 judgment is sustained here, that purpose will be accomplished; nationwide news reporting and commentary, particularly in the civil rights area, will be effectively sterilized.

I. SERVICE OF PROCESS UPON THE NEW YORK TIMES IN ALABAMA VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

Without invoking the Alabama "long arm" statute, Montgomery Commissioner Sullivan could never have forced the *New York Times* to appear in his home forum, and the unconscionable result below could never have oc-

1. See *Parks, et al.* v. *N. Y. Times Co.*, 195 F. Supp. 919 (M. D. Ala. 1962); *N. Y. Times Co.* v. *Connor, et al.*, 291 F. 2d 492 (5th Cir. 1961) (in which the Tribune Company also filed a brief as *amicus curiae* contending service on the *Times* in Alabama was unconstitutional).

curred. The *Times* has adequately presented the reasons "long arm" service in this case violates the First Amendment and the due process limitations of the *International Shoe* doctrine; that discussion will accordingly not be duplicated here. Rather, we shall focus upon the history of trying publishers in alien and hostile forums; this history spotlights the oppressive and unconstitutional consequences that occur whenever the "long arm" technique is used against the press.

It is well known that throughout history, the usurper, the dictator, and the corrupt ruler have attempted to suppress criticism by silencing or controlling the press; a favorite tactic to achieve this goal has long been that of trying publishers away from home and in the most hostile forum available. The infamous Star Chamber asserted virtually unlimited jurisdiction over persons and crimes and after "trial" inflicted unbelievably cruel punishments and fines upon its victims. Many of the defendants were publishers who were "tried" and convicted of sedition or "libel on government" simply because they dared to print criticism of the Crown. These unfortunates stood trial in London regardless of the situs of their homes or their "crimes"; indeed, even foreigners whose alleged crimes were committed outside England were hailed before the Chamber. See Burn, *The Star Chamber*, pp. 14-15 (London, 1870); Bruce, *An Outline of the History of the Court of Star Chamber*, p. 351 (1833); Crompton, *Star Chamber Cases*, pp. 10-32 (London, 1641).

The English again used this tyrannical device in Scotland to stifle unrest during the 17th century; the practice of marching Scottish rebels to London for their "trials" finally became so shameful that it was outlawed in 1707. 11 Holdsworth, *A History of English Law*, pp. 8, *et seq.* (1938). However, after the Scottish revolt in the 18th century, the English reinstated the practice so that conviction of the recalcitrants was assured. Taylor, *The Story of The Rising*, Appendix 5, p. 324 (1906).

The same method of oppression was also relentlessly employed during the colonial period to stamp out all utterances against the British Crown. A statute passed during the reign of Henry VIII [35 Henry VIII c.2 (An Act For The Trial of Treasons Committed Out Of The King's Dominion, 1543)], a 1772 "Royal Instruction" from the King of England to the Rhode Island colony, and a 1774 Act of Parliament provoked by the Boston Tea Party (14 Geo. III, c. 39) exposed virtually anyone who opposed the constituted English authority by speech or writing (as well as all witnesses to the "crime") to transportation to England for trial and inevitable conviction. See Frothingham, *Rise of The Republic of The United States*, pp. 277 *et seq.*, 347 *et seq.* (10th ed. 1910); *Journals of Congress*, October 14, 1774; *Bowles* v. *Richards*, 63 F. Supp. 946, 947 n. 5 (D. C. Ore. 1945).

The practice of trying American colonists away from home and particularly in England became so cruel and unjust that in 1765, the General Congress petitioned the King for relief; nine years later the Massachusetts Bay Colony made the very same petition (". . . we present this petition only to obtain redress of grievances [one of which is] . . . extending the powers of courts of admiralty [to] trying persons in Great Britain for offenses alleged to be committed in America"). Thereafter, when the Continental Congress proclaimed its Declaration of Rights in 1774, it too attacked this abuse demanding "the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law". *Journals of Congress*, October 14, 1774; *Authentic Papers From America Submitted to The Dispassionate Consideration of The Public* (London, 1775).

And when the break with England finally occurred, one of the reasons set forth in the Declaration of Independence

was the trial of Americans away from home and in England:

> "The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let facts be submitted to a candid World. . . . He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; . . . For depriving us in many cases, of the benefits of Trial by Jury: *For transporting us beyond Seas to be tried for pretended offenses.*" (Emphasis added.)

Before the Revolution, the colonial governments also used the English technique of trying a publisher away from home and in the jurisdiction most likely to convict. One of the most widely known cases is that of Thomas Maule, a resident of Salem, Massachusetts, who in 1695 published a book in New York that bitterly criticized the colonial government of Massachusetts; that government promptly responded by charging Maule with criminal libel.

Maule was brought to Boston to be tried before the Lieutenant Governor of the colony and a specially impaneled council. He argued that fairness and justice required that he be tried at his home and not in a locale where he obviously could not receive a fair trial. The Massachusetts council, unable to avoid the force and logic of this argument and at the same time anxious to convict, solved its dilemma by sustaining Maule's argument and then setting his bail so high that he could not leave Boston to return home. Levy, *Legacy of Suppression* (Harvard University Press, 1960) pp. 32-34; Jones, *Thomas Maule.*

Even after independence and the adoption of our Constitution, there have been attempts to resurrect the practice of transporting publishers to an alien and hostile

forum to stand trial for libel because they had dared print criticism of official conduct. These efforts have typically been in the form of criminal libel prosecutions, the crime of sedition having passed into disuse after our experience with the intolerable Sedition Act of 1798.[2] In each instance our courts have decisively rejected the tactic, recognizing it for exactly what it was—an invasion of freedom of speech and of the press. Some notable examples of these incidents are:

The New York Sun and the Administrators of the District of Columbia. In 1873, the *New York Sun* published stories that charged corruption in the awarding of road paving contracts by the administrators of the affairs of the District of Columbia. At once, a criminal libel action was instituted against the *Sun's* editor and publisher, Charles A. Dana; the action was brought in the District of Columbia, the most favorable possible forum for conviction. However, when the Government sought to arrest Dana in New York and transport him to Washington, the District Court in New York refused to issue a warrant. *In Re Dana,* 6 Fed. Cas. No. 3554 (1873).

Theodore Roosevelt and the Indianapolis News. The *Indianapolis News* accused President Theodore Roosevelt, President-Elect William H. Taft, Elihu Root and J. P. Morgan of involvement in profiteering from the purchase of the Panama Canal. Because of the story an indictment was obtained charging the publishers of the *Indianapolis News* with criminal libel; as in the case of the *New York Sun,* the indictment was likewise returned in the District of Columbia. Once again, however, the Government's tactic was held improper; the District Court in Indiana ruled that the defendants could not

2. See Hudon, *Freedom of Speech and Press in America,* pp. 44-54 (Public Affairs Press, 1963).

be made to stand trial in Washington. *United States* v. *Smith, et al.*, 173 Fed. 227 (D. C. D. Ind. 1909). The court's language is, we believe, singularly apposite here:

> "• • • I am speaking of the facts as shown by the evidence here—where people print a newspaper here, and deposit it in the post office here, for circulation throughout other states, territories, counties, and districts, there is one publication, and that is here. If that is true, then there was no publication under the evidence, in Washington.
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> • • • • • •
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> "• • • *To my mind that man has read the history of our institutions to little purpose who does not look with grave apprehension upon the possibility of success of a proceeding such as this. If the history of liberty means anything, if constitutional guaranties are worth anything, this proceeding must fail.*" *Id.* at 232. (Emphasis added.)

The official indignation that provoked the action subsided, and the prosecution pursued the case no further.

The struggle for freedom of the press has now achieved the right to publish in this country without fear of *criminal* libel trials in inimical jurisdictions. So, would-be suppressers have turned to the *civil* libel suit as a possible instrument to suppress; indeed, the civil suit affords an even more efficient tool for such purpose. At most, criminal libel suits can result in limited fines and jail sentences for one or two corporate executives, leaving the corporation as publisher free to continue printing. However, by the civil libel suit, with its concept of unlimited actual and punitive "damages," a publisher can be permanently put out of business by one suit. Moreover, many of the safeguards afforded an accused in a criminal trial are not available to a civil defendant:

(a) A publisher can be made a civil defendant without grand jury indictment;

(b) Discovery procedures against civil defendants are of a breadth unheard of in criminal cases;

(c) Proof against a civil defendant need not be beyond a reasonable doubt;

(d) There is no presumption of the innocence of a civil defendant;

(e) In many jurisdictions, a less than unanimous jury vote is sufficient to hold the civil defendant liable;

(f) The civil defendant is not protected by the rule against double jeopardy; hence, a verdict in favor of such a defendant may be set aside and a new trial ordered;

(g) The civil defendant can be compelled to take the stand to testify against himself;

(h) If the civil defendant wins in the trial court, the plaintiff can always appeal.

Moreover, individual civil defendants (such as the Negro defendants here) who are unable to pay the adjudged damages may be imprisoned under the laws of many states which authorize body execution, *i.e.*, imprisonment for debt, for failure to discharge a judgment predicated on a willful, wanton, or malicious tort. Indeed, there is now pending on certiorari in this Court a case in which a judgment debtor has been so proceeded against under the New York statute. *Gotthilf* v. *Sills, cert. granted*, April 1, 1963, 372 U. S. 957.

A well-known attempt to use the civil libel suit to punish for "libel on government" occurred in *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N. E. 86 (1923), involving this very *amicus* (see *infra*, pp. 14-15); other efforts of the sort have been recorded.[3] Beyond peradventure, the instant

3. See, *e.g.*, *Grell* v. *Hoard*, 206 Wis. 187, 239 N.W. 428 (1931); *Cook* v. *Pulitzer Pub. Co.*, 241 Mo. 326, 145 S.W. 480 (1912); *Borg* v. *Boas*, 231 F. 2d 788 (9th Cir. 1956); *Addington* v. *Times Pub. Co.*, 138 La. 731, 70 So. 784 (1916).

suit (and its companions) are the latest move to use the civil suit to stifle criticism; this particular effort is novel in that the aspiring censors are now seeking to utilize still another distinctive feature of civil procedure for their intended purpose—the concept of "long arm" service. That concept is here being used as the modern counterpart of transporting a publisher "beyond Seas" to be tried for "libel on government."

Whatever may be the desirability of having nationwide service in other kinds of litigation (such as accident and contract suits), such considerations cannot constitutionally apply to newspaper publishers, who are uniquely situated. This Court has frequently had occasion to emphasize that freedom of speech and press holds a preferred position among our constitutionally secured liberties; this freedom is among the "rights which we value most highly and which are essential to the workings of a free society". *Speiser* v. *Randall*, 357 U. S. 513, 521 (1958).[4] Manifestly, that freedom cannot survive if "long arm" statutes may be invoked against publishers; accordingly, the "estimate of inconveniences" that underlies the *International Shoe* doctrine must be resolved in favor of the continued existence and vigor of the basic, preferred liberty of free speech and press. Indeed, the consequences of a contrary holding are appalling.

If the respondent succeeds in his use of the "long arm" statute to bring the *Times* to trial in Alabama and drain its resources of $500,000 plus costs and litigation expenses, national reporting and editorial commentary in this country will have been dealt a severe setback. No newspaper, regard-

4. See also, *e.g.*, *DeJonge* v. *Oregon*, 299 U.S. 353, 364 (1937); *Thomas* v. *Collins*, 323 U.S. 516, 531 (1945); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943); *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

less of its size, can afford the risk of lawsuits across the country in whatever locales the complainants may select; the forum invariably chosen, as in this case, will be that where local unpopularity of the paper's views can be thoroughly exploited by the prosecution to prevent the publisher from receiving a fair trial.

Moreover, even apart from such mammoth judgments as that rendered here, the financial expenditure necessary to defend foreign suits could itself destroy many of the nation's publishers. Such an exposure, whether the publisher be the *New York Times* or the country's smallest weekly, would inevitably force publishers to curtail and dilute news, editorials, and advertising concerning all controversial subjects, especially such emotion-laden topics as desegregation. Plainly, no other alternative would be possible because the net cast by Alabama under its "doing business" theory of service is so all-encompassing that no one could publish anywhere and avoid its sweep.

It is therefore critical, we submit, that the Court make an immediate, definitive holding that "long arm" service upon a publisher, as attempted and sustained below, is in violation of the Constitution. Irreparable damage to the preferred right of free speech and press will necessarily occur if this Alabama precedent is not voided here and now.

II. THE JUDGMENT BELOW IS A REINCARNATION OF THE LAW OF SEDITIOUS LIBEL.

The Martin Luther King Committee's fund-raising plea was a typical exercise of the right to comment upon the policies of government and to seek support for a change; it was a sharply-worded criticism of Southern governmental resistance to integration. Because the *Times* printed this plea, it (together with several Alabama Negroes) was found guilty of "libeling" an elected Southern official nowhere named in the advertisement. And even though

the plaintiff did not show one iota of actual money damages, he was awarded $500,000—an amount that few publishers can afford to pay without being forced out of business. Clearly, the judgment below is an unconstitutional attempt to reincarnate the long-buried doctrine of seditious libel. We submit that no one could read the seditious libel cases and not be struck by the ominous parallel between those actions and what has now occurred in Alabama.

The roots of the law of seditious libel reach back to the despotic *De Scandalis Magnatum*, 3 Edward I, c. 34 (1274), an edict designed to quell political unrest and outlaw all critical utterances against the Crown. See 1 Hallam, *Constitutional History of England*, pp. 36, *et seq.* (5th Ed. 1841); Hudon, *Freedom of Speech and Press in America*, p. 9 (Public Affairs Press, 1963). "Seditious libel" came to mean criticism of government or its officials; it consisted of "... written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever ...." 2 Stephen, *A History of the Criminal Law of England*, p. 350 (1883). See Plucknett, *A Concise History of the Common Law*, p. 500 (5th ed. 1956). In short, it was a concept diametrically opposed to every right of expression now secured by the First and Fourteenth Amendments. Enforcement of the doctrine was vested in the Star Chamber because, unlike the common law courts, the Chamber was of royal prerogative and thus was not bound by the rules of evidence or procedure, heard only its own counsel, and sat only when it pleased.[5] See Scofield, *A Study of the Court of Star Chamber*, Intro. pp. 13, *et seq.* (1900); Burn, *The Star Chamber*, Preface, pp. 10, *et seq.* (London, 1870).

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5. The power of the Star Chamber to punish and silence criticism was strengthened when *De Scandalis Magnatum* was reenacted to proscribe "seditious words," 1 Eliz., c. 6 (1559); under this prohibition, indirect or general words not within reach of the common law could be punished, and the defense of truth was specifically disallowed. In 1605, the Chamber's authority was again broadened by adoption

Curiously, the Chamber was not empowered to inflict the death penalty; however, it easily circumvented this restriction by imposing upon defendants charged with seditious libel unlimited fines, imprisonment, pillory, flogging, mutilation, and branding, so that the practical result was the same. See Siebert, *Freedom of the Press in England, 1476-1776*, pp. 121-122 (1952); Scofield, *supra*, at pp. 13-14. The Alabama courts here could not, of course, order pillory, flogging or mutilation for the *Times'* act of "libel", but they did the next best thing. Such an enormous judgment was imposed that even the most intrepid publisher must be intimidated into silence; no publisher could or should—in deference to his employees, his stockholders, and his community—risk complete obliteration by such a proceeding.

Nor does the likeness between the early seditious libel actions and the instant case stop with the enormity of the judgment below. The Chamber, to quiet those who displeased, would on many occasions indulge in the rankest form of sophistry to twist a publication of general criticism into a libel on government. Thus, in *Trial of Wm. Prynn*, 3 How. St. Tr. 561 (1632), the defendant had published a book deprecating stage plays and other public amusements; the Star Chamber construed this as a specific libel upon the Queen because she had attended plays or dances.[6] Similarly, in *Trial of Alexander Leighton*, 3 How. St. Tr. 383 (1630), the accused had written a critique about the English clergy; the Chamber read this pamphlet as a direct insult

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of the Roman doctrine of *libellus famosus*; this expanded the Chamber's jurisdiction to encompass any and all insults to public persons. *De Libellis Famosis*, 5 Coke's Reports 125a, 77 Eng. Rep. 250 (1605).

6. Prynn was sentenced to a fine of 10,000 pounds, to have his nose slit and his ears cut off, to be twice pilloried, to be branded on the forehead, and then to be imprisoned for life; all the copies of his book were ordered to be burned by the common hangman. See Burn, *supra*, at pp. 133-35.

to the Crown because of the relationship between Church and State.[7] We believe the same involuted reasoning used by the Star Chamber to find "libel" was also indulged in by the court below to justify the holding of liability and the financially destructive judgment rendered.

When the Star Chamber was abolished in 1641, jurisdiction over defendants charged with seditious libel was transferred to the common law courts, and they proved even more merciless. See 2 Stephen, *supra*, at pp. 300-01. Those courts followed the doctrines of the Star Chamber and had the added power of inflicting the death penalty, which was often done by decapitation, drawing, quartering, severing of limbs, or excision of organs. *Rex* v. *Twyn*, 6 How. St. Tr. 514 (1664), well illustrates the common law courts' approach to all who were in any way involved in publishing a complaint about government. There, a printer of a book that criticized the monarchy received the following sentence:

> "Therefore the Judgment of the court is, and the court doth award, 'That you be led back to the place from whence you came, and from thence to be drawn upon an hurdle to the place of execution; and there you shall be hanged by the neck, and being alive, shall be cut down, and . . : [*omitted pursuant to Rule 40 (5)*] shall be cut off, your entrails shall be taken out of your body, and, you living, the same to be burnt before your eyes; your head to be cut off, your body to be divided into four quarters and your head and quarters to be disposed of at the pleasure of the king's majesty. And the Lord have mercy upon your soul.'" *Id.* at 535-36.

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7. Leighton was degraded from the ministry, taken to Westminster and there pilloried, whipped, one of his ears was cut off, his nose was slit, and he was branded on the face; the sentence was repeated at Cheapside on market day after Leighton had recovered from his Westminster ordeal. He was then imprisoned. See Burn, *supra*, at pp. 129-30.

The English law of seditious libel was transplanted to American soil in early colonial times. In 1635, Roger Williams was banished from Massachusetts for the "crime" of disseminating "newe and dangerous opinions, against the aucthortie [sic] of magistrates." 1 Shurtleff, *Records of the Governor and Company of the Massachusetts Bay in New England, 1628-1686*, p. 160 (1853-1854).[8] The doctrine of seditious libel persisted even after the adoption of our Constitution, and was codified in the Sedition Act of 1789 (1 Stat. 596).[9] After a brief and bitter experience with that Act, the crime of seditious libel finally and properly fell into disuse and oblivion in this nation. Hudon, *Freedom of Speech and Press in America*, pp. 44-45 (Public Affairs Press, 1963); Chafee, *Free Speech in the United States*, pp. 506-07 (Harv. Univ. Press, 1941).

However, as we discussed earlier, attempts were then made to use the civil libel suit—with its lack of criminal safeguards and unlimited "damages"—as a method for killing a newspaper. One of the most noteworthy such attempts was *City of Chicago* v. *Tribune Co.*, 307 Ill. 595, 139 N. E. 86 (1923). There, the mayor of Chicago, William Hale Thompson, whose administration was marked by graft and corruption, sought to silence this *amicus*, his bitterest and most vocal critic. Thompson caused a libel

8. See also *Trial of Peter Zenger*, 17 How. St. Tr. 675 (1735).

9. "Fear brought about the Sedition Act of 1798 just as fear had brought about the statute *De Scandalis Magnatum* 524 years earlier in England. In both instances, the motivating force was apprehension over the possible effects of adverse criticism; the purpose of both acts was to silence unfavorable comment on the government and to protect those of authority in the government from verbal and written attack. The later act, the Sedition Act, sought to incorporate the English law of seditious libel into American law by statutory enactment." Hudon, *Freedom of Speech and Press in America*, p. 52 (Public Affairs Press, 1963).

suit for ten million dollars to be filed against the *Tribune* on behalf of the City of Chicago. The City based its claim upon certain articles that had charged it with bankruptcy; such an accusation would, if false, have been libelous of a private institution. In a now celebrated opinion, the Supreme Court of Illinois, after an exhaustive review of the authorities, struck down the action, declaring it repugnant to the guarantees of free speech and free press. The court noted that "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." 307 Ill. at 601, 139 N. E. at 88. See Kinsley, *Liberty and the Press*, pp. 18-27 (1944).

This Court is now confronted with still another effort to use the civil libel action for seditious libel purposes. The attempt is all the more alarming here because it has been upheld by a state supreme court in the name of the very Constitution that it flouts; the travesty is in fact rationalized by an opinion that is as adroit and scholarly-sounding as it is oppressive.

We have urged above that the Court should squarely void the use of "long arm" service upon the *Times* in Alabama so that other publishers will not face the same exposure (*supra*, pp. 2-10). We here submit that, in this case involving the preferred right of free speech and press, the Court should also expressly condemn the lower courts' holding of "libel" so that other would-be suppressers will not be inspired to renew respondent's claim the next time government is criticized.

CONCLUSION.

For the foregoing reasons, the Tribune Company respectfully urges the Court to reverse the holdings below that the *New York Times* was validly served pursuant to the Alabama "long arm" statute and that the publication in question was an actionable libel.

Respectfully submitted,

HOWARD ELLIS,
KEITH MASTERS,
DON H. REUBEN,
130 East Randolph Drive,
Chicago 1, Illinois,
Attorneys for the Tribune Company,
Tribune Tower, Chicago, Illinois.

August 30, 1963.